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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 317

ANTERO PEREZ RODRIGUEZ,
Petitioner,

v.

ALCOA STEAMSHIP COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ANTERO PEREZ RODRIGUEZ, *Petitioner,* v. ALCOA STEAMSHIP COMPANY, INC., *Respondent.*	No. 317

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

1. Constitution, art. IV, § 3, cl. 2—

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . ."

2. Second Organic Act of 1917, § 7 (Puerto Rican Federal Relations Act, 48 U. S. C. § 747)—

> *Public property transferred*
>
> All property which may have been acquired in Puerto Rico by the United States under the cession of Spain in the treaty of peace entered into on the 10th day of December, 1898, in any public bridges, road houses, water powers, highways, unnavigable

streams and the beds thereof, subterranean waters, mines or minerals under the surface of private lands, all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Puerto Rico, all the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not reserved by the United States for public purposes prior to March 2, 1917, is placed under the control of the government of Puerto Rico, to be administered for the benefit of the people of Puerto Rico; and the Legislature of Puerto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable. Mar. 2, 1917, c. 145, § 7, 39 Stat. 954; May 17, 1932, c. 190, 47 Stat. 158.

3. Second Organic Act of 1917, § 8 (Puerto Rican Federal Relations Act, 48 U. S. C. § 749)—

"Harbors and navigable waters transferred

The harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, owned by the United States on March 2, 1917, and not reserved by the United States for public purposes, are placed under the control of the government of Puerto Rico, to be administered in the same manner and subject to the same limitations as the property enumerated in sections 747 and 748 of this title. All laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as the same may be locally in-

applicable, shall apply to said island and waters and to its adjacent islands and waters. Nothing contained in this chapter shall be construed so as to affect or impair in any manner the terms or conditions of any authorizations, permits, or other powers lawfully granted or exercised in or in respect of said waters and submerged lands in and surrounding said island and its adjacent islands by the Secretary of the Army or other authorized officer or agent of the United States prior to March 2, 1917. Mar. 2, 1917 c. 145, § 8, 39 Stat. 954; May 17, 1932, c. 190, 47 Stat. 158; July 26, 1947, c. 343, Title II, § 205 (a), 61 Stat. 501."

4. Second Organic Act of 1917, § 37 (Puerto Rican Federal Relations Act, 48 U. S. C. § 821)—

"Legislative power

The legislative authority shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities so far as may be necessary, to provide and repeal laws and ordinances therefor; also the power to alter, amend, modify, or repeal any or all laws and ordinances of every character in force in Puerto Rico or municipality or district thereof on March 2, 1917, insofar as such alteration, amendment, modification, or repeal may be consistent with the provisions of this chapter. Mar. 2, 1917, c. 145, § 37, 39 Stat. 964; May 17, 1932, c. 190, 47 Stat. 158."

Statement of the Case

While largely uncontroversial, petitioner, in his "Statement of the Case", and as part of his effort to isolate the Court of Appeals decision from those of this Court and a number of other Courts of Appeals, observes (p. 7) that the Court below "made no references to the decisions of all other federal courts which reach the diametrically opposite result", implying that the Court either overlooked or ignored such decisions.

Apart from the fact that it was interpreting a statute other than that involved in the decisions noted by petitioner, one set in a different body in law,* as will be more fully discussed hereinafter, the Court below did indeed so distinguish (petition p. 33) *Reed* v. *s/s Yaka,* 373 U. S. 410 (1963) upon which all of the decisions appearing on page 7, footnote 2, depend. Moreover, it should have been evident to petitioner that the Court below was not writing on a fresh page of history.

The same innuendo as to ignoring or overlooking, this time its own decisions, appears on pages 8 and 9 of the petition. It should be sufficient to point out that the author of the opinion below was a member of the panel deciding each of these cases noted on page 8, footnote 7, and further is probably one of the leading judicial authorities on the unique status of Puerto Rico, having written two** of the four*** Court of Appeals background decisions dealing

*"Its present commonwealth status is unprecedented in our American history and has no exact counterpart elsewhere in the world". Magruder "The Commonwealth Status of Puerto Rico" 15 Univ. Pitts. Law Review 1, 5.

**_Guerrido_ v. _Alcoa Steamship Company, Inc._, 234 F. 2d 349 (1 Cir. 1956); _Waterman Steamship Corporation_ v. _Rodriguez_, 290 F. 2d 175 (1 Cir. 1961).

***_Lastra_ v. _New York and Porto Rico S.S. Co._, 2 F. 2d 812 (1 Cir. 1924) _Fonseca_ v. _Prann_, 282 F. 2d 153, (1 Cir. 1960). The latter referred to Judge Maris' opinion in _Guerrido_ as a "careful and thorough analysis of the applicable legislation, opinions and historical documents. . . ."

with the interrelationship between the Puerto Rico Workmen's Accident Compensation Act (11 L. P. R. A., § 21) and the maritime law of the United States.

That the Court below did not discuss the exlusiveness of remedy provision of the Puerto Rican Act in terms of an indemnity action under *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 (1956) may be disappointing to petitioner, but is evidence only of the lack or relevance of such a discussion to the issue herein. The decisions of this Court* and those of the Supreme Court of Puerto Rico** are in complete accord as to the insulation provided by the exclusiveness of remedy provisions of the respective acts in non-contractual indemnity situations.

Petitioner renders the Court below one final disservice when he asserts that the decision below and *Alcoa Steamship Company, Inc., et al* v. *Velez,* (pet. p. 35) 376 F. 2d 521, decided the same day by the same Court and written by the same judge, are "impossible to reconcile or harmonize" (pet. p. 20). Petitioner erroneously claims that the "sole criterion for a different result in the *Velez* case is that the contract of employment was not entered into in Puerto Rico." A reading of the decision, however, (pet. p. 35-41) shows how it was reached on the basis of a congeries of factors, including ownership outside of Puerto Rico, the temporary nature of the seamen's employment in Puerto Rico, the overall non-residency and employment of the seamen involved, the characteristic concept of the maritime law

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**Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.* 350 U. S. 124, 130-131 (1956) *Weyerhaeuser S.S. Co.* v. *Nacirema,* 355 U. S. 563, 569 (1958).

***Julia, Pablo, et al, surnamed Cortijo Walker,* v. *Puerto Rico Water Resources Authority,* P. R. R., (Dec. 18, 1964) (petition, p. 58) and *Eliezer Marcano Torres* v. *Puerto Rico Water Resources Authority,* (January 20, 1965), (petition, p. 68).

following the flag and the disruptive effect on both employer and employees of having duplicate and competing systems of recovery for injuries dependent only on locale.

REASONS FOR DENYING THE WRIT

I. THERE HAS NEVER BEEN ANY REQUIREMENT OF FULL CONSTITUTIONAL UNIFORMITY IN PUERTO RICO. WITH NO COMMON DENOMINATOR THERE CAN BE NO CONFLICT BETWEEN THE DECISIONS INTERPRETING THE LONGSHOREMEN'S ACT AND THOSE INTERPRETING THE PUERTO RICAN COMPENSATION ACT.

Almost from the very outset there has been a lack of application to Puerto Rico of Constitutional provisions otherwise uniform in the United States. Thus in *Downes* v. *Bidwell,* 182 U. S. 244, 277, 287, this Court held in 1901 that article 1, section 8 of the Constitution requiring duties to be uniform "throughout the United States" did not pertain to Puerto Rico.

In *Dorr* v. *United States,* 195 U. S. 138, 149 (1904) it was held ". . . that the Constitution does not without legislation, and of its own force, carry such right (trial by jury) to territory (Philippine Islands) * * *", (emphasis added) not made a part of or incorporated into the United States.

Twenty years after *Downes* v. *Bidwell,* supra, this Court said in *Balzac* v. *People of Puerto Rico,* 258 U. S. 298, 304 (1922) that it was "clearly settled" that Constitutional requirements appearing in article 3 of the Constitution and in the 6th and 7th Amendments as to jury trials, did not apply to territory not incorporated into the Union and that Puerto Rico was not so incorporated (p. 305). This Court also went on to answer, forty-five years ago, petitioner's current argument that because citizens of Puerto Rico are

citizens of the United States, their rights must be in every respect identical (p. 307-309)*.

Given this background, the decision of the Circuit Court of Appeals in *Lastra et al* v. *New York and Porto Rico S.S. Co.*, 2 F. 2d 812 (1924) follows in logical sequence. Noting (p. 813 that the Constitution does not apply to Puerto Rico *ex proprio vigore***, the Court found that the admiralty provision of the Constitution (art. 3, § 2) did not therefore extend to Puerto Rico unless Congress had put it there by legislation (p. 813-814).

The subsequent decision in 1956 of *Guerrido* v. *Alcoa Steamship Company Inc.*, 234 F. 2d 349 (1st Circuit), adhered to this view, stating (p. 352):

> "Since Puerto Rico is neither a state of the union nor a territory which has been incorporated into the union preliminary to statehood, it is true that all the provisions of the federal Constitution are not necessarily in force within its borders."

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*More fundamental than petitioner's complaint that his only recovery is under the local compensation act (as it is for all other Puerto Rican employees) is the observation that Puerto Ricans do not vote for their President nor for any of the members of Congress who legislate for them. On the other hand they pay no federal income tax. 48 U. S. C. 734.

In the same vein, petitioner's reference to 48 U. S. C. 737 is misplaced. The purpose thereof is to make sure that *all* citizens of the United States be treated alike in Puerto Rico, since the Constitutional protection as to privileges and immunities (art. IV, § 2, cl. 1) refers only to citizens of states. Nor does the Fourteenth Amendment apply to Puerto Rico. *South Porto Rico Sugar Co.* v. *Buscaglia*, 1 Cir. 154 F. 2d 96, 101 (1946); *Mora* v. *Torres*, 113 F. Supp. 309, 319 (D. C. P. R. 1953), affirmed sub nom. *Mora* v. *Mejias*, 206 F. 2d 377 (1 Cir. 1953).

**In approving a Constitution for Puerto Rico, Congress in House Report 2275 of June 19, 1950 (1950 U. S. Code Congressional Service, 81st Congress, Second Session, p. 2681) distinguished between the then incorporated territories of Alaska and Hawaii, observing that the Constitution and laws of the United States were extended to them (p. 2683) but (p. 2684) "The Constitution has never been extended to Puerto Rico".

In 1960 in *Fonseca* v. *Prann,* 282 F. 2d 153, the Court of Appeals for the First Circuit faced squarely up to whether or not uniformity of the maritime law was required in Puerto Rico. Reviewing *Lastra* and *Guerrido,* the Court found (p. 156) that it was not aware of any Constitutional principle which prevented Congress from giving Puerto Rico jurisdiction over its own waters, fully cognizant (p. 157) that its holding "creates an area of lack of uniformity in the maritime law." and going on to observe that "absolute uniformity in things maritime is not a constitutional requirement nor is it even essential to the proper harmony of the maritime law in its interstate and international relations."*

With the issue of uniformity specifically posed by the Court below, a petition for writ of certiorari was filed in *Fonseca,* urging the same arguments as to uniformity, Fourteenth Amendment and conflicts with this Court's decisions, (See Petition, No. 709 October Term 1960) and this Court declined to intervene, 365 U. S. 860 (1960), on this same issue three years before *Reed* v. *s/s Yaka,* 373 U. S. 410 (1963).

There is nothing new in the petition herein on the issue of uniformity.

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*Some other areas of lack of uniformity in the maritime law are:

(1) application of various State death acts to maritime torts, *m/v Tungus et al* v. *Skovgaard,* 358 U. S. 588 (1959);

(2) the possession of a cause of action for wrongful death for unseaworthiness under state statutes by estates of longshoremen and harbor workers, but not by those of seamen, *Gillespie* v. *U. S. Steel,* 379 U. S. 148 (1964);

(3) reference to various state statutes of limitation by analogy, *McAllister* v. *Magnolia Petroleum Co.,* 357 U. S. 221 (1958);

(4) the regulation of marine insurance by the States, *Wilburn Boat Co.* v. *Firemen's Fund Ins. Co.,* 348 U. S. 310 (1955).

II. IN THE ABSENCE OF A CONSTITUTIONAL MANDATE FOR UNIFORMITY IN PUERTO RICO, CONGRESS, ACTING UNDER ITS CONSTITUTIONAL POWER TO LEGISLATE FOR NATIONAL TERRITORIES, COULD HAVE EXTENDED THE ADMIRALTY PROVISION OF THE CONSTITUTION TO PUERTO RICO, BUT HAS INSTEAD ENABLED PUERTO RICO TO ENACT ITS OWN LEGISLATION FOR LOCAL MARITIME WORKERS.* UNDER THE CIRCUMSTANCES, PETITIONER FAILS TO INFORM THIS COURT HOW OR WHY IT SHOULD INTERVENE.

There is no question that under its power to legislate for territories (art. IV, § 3, cl. 2 of the Constitution), Congress could have made the statutory and general maritime law of the United States fully applicable to Puerto Rico. This power has been recognized in all the leading Court of Appeals decisions on the subject. *Lastra,* p. 813-814; *Guerrido,* p. 355, *Fonseca,* p. 155 and *Waterman* v. *Rodriguez,* p. 179, but as *Lastra* points out (p. 813) "We find no such legislation but the reverse".

This Court has also acknowledged the broad powers given by Congress to Puerto Rico, commenting in *People of Puerto Rico* v. *Shell Company, Ltd.,* 302 U. S. 253, 261-262 (1937) that the aim of the Foraker Act, (April 12, 1900, Chapter 191, 31 Stat. 77) and the Organic Act, (March 2, 1917, Chapter 145, 39 Stat. at L. 951.) was to give "full power of local self-determination" to Puerto Rico. Referring also (p. 263) to "the sweeping character of the congressional grant of power contained in the Foraker Act and the Organic Act of 1917", this Court noted the "general

*Nor does the FELA cover railroad workers in Puerto Rico. Despite its otherwise uniform application as described by this Court in *Second Employer's Liability Cases* 223 U. S. 1, 55 (1912) *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147 (1917), it has long been established that railroad employees in Puerto Rico are covered by the local compensation act and not by the FELA. *Camunas* v. *Porto Rico Ry. Light & Power Co.,* 272 F. 924 (1 Cir. 1921), Appeal dismissed 260 U. S. 700.

purpose of Congress to confer power upon the government of Puerto Rico to legislate in respect of all local matters is made manifest."

Succeeding enactments have effectively demonstrated how the autonomy of Puerto Rico has been expanded by Congress, in what this Court has termed "the unique historic relationship between the Congress and the Commonwealth of Puerto Rico, . . ." *Katzenbach* v. *Morgan,* 384 U. S. 641, 658 (1966).

The progression can be visualized when it is noted that under the Foraker Act of 1900, 31 Stat. 77, Puerto Ricans were able to elect popularly only the lower house of the territorial legislature and the Resident Commissioner. Under the Organic Act of 1917, 39 Stat. 951, the upper house was brought under the elective procedure and the appointed Governor able to select four of six cabinet members. In 1947, 61 Stat. 770, the Governor of Puerto Rico was permitted to be elected popularly rather than appointed by the President of the United States, and able to appoint all his cabinet members. In 1950, Puerto Ricans were permitted to write their own constitution (48 U. S. C. 731b), which they did after a referendum approving a Constitution, a Constitutional Convention, a referendum approving the Constitution as framed, Congressional and Presidential approval and a proclamation by the Governor of Puerto Rico on July 25, 1952. This Constitution afforded Puerto Rico the largest measure of independence yet accorded it by Congress. See House Report 1832, April 30, 1952 (1952 U. S. Code Cong. Service, 82nd Congress, Second Session pp. 1892-1902), containing also the message of President Truman.

Illustrative of the official attitude of the United States toward Puerto Rico, was a communication by the State Department to the United Nations, characterizing the new

status of Puerto Rico as no longer that of "non-self governing nation", Bulletin of the Department of State, Vol. 28, No. 721, April 20, 1953, p. 584, et seq.

The various House Reports reflect this trend.

House Report No. 455, May 26, 1947 (1947 U. S. Code, Cong. Service, 80th Congress, First Session, p. 1587-1589) seeking to amend the Organic Act to provide for a popular election of the Governor of Puerto Rico, pointed out that the existing Organic Act of 1917 gave the Puerto Rican legislature authority extending "to all matters of a legislative character not locally inapplicable." The Congressional Report went on to state that the people of Puerto Rico had demonstrated a "high degree of political consciousness by the extensive use of the franchise," and that 82.2% of electorate went to the polls in 1944. The report also noted the policy of the United States to encourage the "self-governing ability" of the people of Puerto Rico since 1900.

In 1950, House Report 2275, repeating in substance Senate Report S 3336 (1950 U. S. Code Cong. Service, 81st Congress, Second Session, p. 2681) approved the adoption of their own constitution by the people of Puerto Rico, noting (p. 2682) that this would

> "further implement the self-government principle established by the Congress as the cornerstone and fundamental policy governing the relationship of the United States toward territories over which it has jurisdiction."

The Report commented further (p. 2682) that the people of Puerto Rico were overwhelmingly in favor of having their own constitution, and further that this legislation "constitutes a reflection of the very strong sentiment which

exists in Puerto Rico for a greater measure of local autonomy which this bill represents."

House Report No. 1832, April 30, 1952 (1952 U. S. Code Congressional Service, 82nd Congress, Second Session, p. 1892) commented favorably on the Constitution for Puerto Rico. This was said to constitute (p. 1892) * * * the latest of a series of enactments through which the Federal Government has provided ever increasing self-government in Puerto Rico." The Constitution, it was said (p. 1899) "represents the will of the people of Puerto Rico. Upon its approval the people of Puerto Rico assume full authority and responsibility of local self-government."

President Truman in his message of April 22, 1952, recommending Congressional approval of the Constitution, stated (p. 1902):

> "With its approval, full authority and responsibility for local self-government, will be vested in the people of Puerto Rico. The Commonwealth of Puerto Rico will be a government which is truly by the consent of the governed."

On the very issue of the Puerto Rico Compensation Act, the decisions of the Court of Appeals for the First Circuit (as previously mentioned) specifically acknowledge the powers of Congress with *Fonseca,* saying (282 F. 2d 153, 157):

> "Of course, if Congress sees fit it may supplant the local legislation as it applies to local navigable waters by making the Jones Act and the general maritime law of unseaworthiness specifically applicable in Puerto Rican waters, but it is not our function to do so."

In view of all the foregoing, the failure of Congress to act in this area may be deemed to be advised rather than inadvertent. Indeed, House Report No. 455, May 26, 1947, (1947 U. S. Code Cong. Service, 80th Congress, First Session, p. 1587) pointedly observes that for the thirty years since the Organic Act of 1917 "Congress has never found it necessary to exercise its prerogative of annulling any law enacted by the Puerto Rican legislature".

It must be presumed therefore that when Congress enacted the Organic Act of 1917, and particularly Sections 7, 8 and 37 thereof (continued as 48 U. S. C. 747, 749, 821 in the Puerto Rican Federal Relations Act), Congress gave the Puerto Rican legislature, as was said in *Guerrido,* 234 F. 2d 349 "general legislative power concerning Puerto Rican waters." (p. 354). This interpretation has now survived for the ensuing fifty years in a climate of ever widening autonomy for Puerto Rico.

There being no constitutional requirement for uniformity (No. I) and with Congress having refrained from intervention (No. II), petitioner affords this Court no reason why or how it should do so.

III. THERE BEING NO CONSTITUTIONAL OR CONGRESSIONAL MANDATE FOR UNIFORMITY, THE ONLY REMAINING CONSIDERATION IS AS TO THE CONSTRUCTION OF THE LOCAL COMPENSATION ACT OF PUERTO RICO, AN AREA WHEREIN THIS COURT TRADITIONALLY DEFERS TO THE LOCAL COURTS.

There being no issue requiring constitutional or congressional interpretation, the only remaining question is as to construction of the exclusiveness of remedy provision in the local act, a task reserved for the local courts. While this Court has freely construed the Longshoremen and Harbor

Workers Compensation Act*, it has traditionally deferred to the decisions of the Supreme Court of Puerto Rico in interpreting local Puerto Rican legislation.**

Thus, in discussing the very act in question, the Puerto Rico Workmen's Accident Compensation Act, this Court said in *Bonet* v. *Texas Co.*, 308 U. S. 463, 471 (1940), citing the earlier decision of *Bonet* v. *Yabucoa Sugar Co.*, 306 U. S. 505, 510:

> "Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island."

Pointing out that lip-service to this admonition was not enough, this Court went on to say (p. 471):

> "To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal choose what might seem, on appeal, to be the less reasonable of two possible interpretations."

This is so even if the local rule may be one, as was said in *DeCastro* v. *Board of Commissioners of San Juan*, 322

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*The exclusiveness of remedy provision alone was passed upon in *Nogueira* v. *New York, New Haven and Hartford Railroad Co.*, 281 U. S. 128, 137 (1930); *Crowell* v. *Benson*, 285 U. S. 22, 42 (1932); *Norton* v. *Warner Company*, 321 U. S. 565, 570 (1944); *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1 (1946); *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85, 102 (1946); *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124, 125, 129, 140 (1956); *Reed* v. *s/s Yaka*, 373 U. S. 410, 414-415 (1963); *Jackson* v. *Lykes Brothers Steamship Co., Inc.*, 386 U. S. 731 (1967).

**Indeed, this Court has, in at least one context, agreed with the local interpretation of the Puerto Rican Act as to exclusiveness. See *Guzman* v. *Pichirilo*, 369 U. S. 698, 699 (footnote 1) (1962).

U. S. 451, 458-459 (1944), which is "out of harmony with our traditional system of law and statutory construction." (and further p. 455):

> "Hence we have emphasized as a cardinal principle of review in such cases that the mere fact that our own system of law and statutory construction would call for the application of one rule to a given set of facts, does not preclude the adoption of a different one by the insular courts."

The rule of the *Bonet* and *DeCastro* cases was reaffirmed in *In Re Sawyer*, 360 U. S. 622, 640 (1959) when this Court said:

> "Of course this Court and the Courts of Appeal must give the Territorial Courts freedom in developing principles of local law and in interpreting local legislation."

(a) The Supreme Court of Puerto Rico has consistently and without exception deemed its Workmen's Accident Compensation Act to be the exclusive remedy of all employees (including local seamen) against their employers who comply with the Act.

In support of the foregoing, see *United Porto Rican Sugar Co.* v. *District Court,* 44 P. R. R. 904, 906-907 (1933) (local seaman) and *Onnia* v. *The Texas Co.,* 64 P. R. R. 497, 502 (1945). In *DeJesus* v. *Osorio, et al.,* 65 P. R. R. 601 (1946), the Court not only adhered to the exclusive provisions of the Puerto Rican Compensation Act, but went on to define the purposes of the act, and construe it as drawn (p 604):

> "We cannot agree with the appellant. The purposes sought by workmen's compensation acts, such as ours, comprise not only the enlargement of the

rights of the workman, but also the limitation of the employer's liability. While on the one hand the employer, or his insurer, is compelled to pay compensation without reference to any fault or negligence on his part, and the defense of a contributory negligence or negligence of a fellow servant and other defenses are eliminated, on the other hand, the amount of the compensation is limited and in case of death, compensation is allowed only to those who were dependent for support on the workman. It is therefore perfectly consistent with those purposes to eliminate, as our statute expressly did, all remedies against the employer based on a labor accident, except those expressly provided by the statute. If the result is, as in the case at bar, that certain persons are deprived of the right to compensation, in case of death, which they had before the approval of the act, we can not say that that result was not within the intention of the lawmaker, particularly in view of the fact that persons not dependent on the deceased workman are the only ones deprived of such right."

On December 18, 1963, some seven months after the decision of this Court in *Reed* v. *s/s Yaka,* the Supreme Court of Puerto Rico decided *Inter Island Shipping Corporation* v. *Industrial Commission of Puerto Rico,* P. R. R. December 18, 1963 (petition p. 42) and in a comprehensive opinion, traced the history and legislative background of the local compensation act, reviewed the *Lastra, Guerrido, Fonseca and Waterman* v. *Rodriguez* decisions, and found that the Puerto Rican Workmen's Compensation Act made the general maritime law of the United States "locally inapplicable" and under the circumstances was therefore the exclusive remedy of the injured seaman.

More recent decisions of the Supreme Court of Puerto Rico underscore its philosophy of approving the existing unified system of compulsory compensation administered under the aegis of the government for the benefit of the employee to the complete exclusion of any other redress against his employer who complies with the Act. This was expressed in *Julia, Pablo, et al. surnamed Cortijo Walker* v. *Puerto Rico Water Resources Authority,* ..... P. R. R. ..... (December 18, 1964) (petition p. 58, 61-62) and also *Marcano Torres* v. *Puerto Rico Water Resources Authority,* ..... P. R. R. ..... (January 25, 1965) (petition p. 68). For example, the Court said in *Julia, Pablo et al.* (petition p. 62) that originally there were exceptions to the exclusiveness of remedy provision when the injuries were caused by an illegal act or criminal negligence. These were eliminated in 1935, so that presently the only exception is the uninsured employer, and, as the Court, the same panel as decided the *Inter Island* case, supra, one year before, said "This is the only case."

While agreeing (p. 48) that it was "manifestly undesirable" that a local statute be first construed in a Federal Court, the Circuit Court of Appeals in *Camunas* v. *New York and Porto Rico Steamship Co.,* 260 F. 40, 55 (1919) nevertheless went on to construe the original compensation act and find that there was not even "reasonable doubt that the Porto Rican Legislature intended to impose, upon employers and employees alike, the compensation theory in substitution for the negligence theory."

It is evident that Puerto Rican policy (petition, p. 62) favors the certainty of workmen's compensation over the hazards of damage actions as the most salutory way of benefiting workmen injured in the course of their employ-

ment and, as this Court observed in *Norton* v. *Warner Company,* 321 U. S. 565, 571 (1944) "Whether they (damage actions) are more desirable than system of compensation is not for us to determine." (parenthetical reference supplied)

(b) Apart from the power of the Puerto Rican legislature to pass, and that of the Puerto Rican Supreme Court to construe its own laws, where the same act applies to all employees it would be unfair and unjust to permit a certain form of employee (longshoreman or harbor worker) to both sue his employer for damages and collect compensation, while all others have only their compensation remedy.

(1) Longshoremen vis a vis railroad workers.

Following *Camunas et al* v. *Porto Rico Ry. Light and Power Co.,* 272 F. 924 (CCA 1st 1921), railroad employees were covered by the Porto Rico Compensation Act and not by the FELA. They may not, therefore, sue their employer. As the Court said (p. 929), "We can conceive of no reason why Congress should desire to put employees of Porto Rican railroads in a class by themselves so far as remedy for accidents is concerned." This decision has remained untouched by Congress for forty-six years. It also furnishes a separate and distinct impetus for not applying the Jones Act, 46 USC 688, which incorporates the FELA, in Puerto Rico.

(2) Longshoremen vis a vis seamen.

It has been held in *United Porto Rican Sugar Co.* v. *District Court* 44 P. R. R. 904, 906-907 (1933); *Fonseca* v. *Prann,* 282 F. 2d 153, cert. den. 365 U. S. 860; *Inter Island Shipping Corporation* v. *Industrial Commission of Puerto Rico,* ..... P. R. R. ..... (December 18,

1963) (petition p. 42) and finally *Alcoa Steamship Company, et al* v. *Ulpiano Velez,* 376 F. 2d 521 (1st Cir., 1967) (petition p. 35), that local seamen are covered by the compensation act and not by the Jones Act or the general maritime law.

Thus in Puerto Rico, the longshoreman, who asserts certain derivative rights because of his identity as a seaman, would, following petitioner's argument, have greater rights than local seamen. This would not be true under the Longshoremen's Act, 33 U. S. C. 902 (3) where seamen in the traditional sense are excluded from coverage. Their ancient remedies are preserved to them as it was apparently their wish that this would be so. See *Norton* v. *Warner Corp.,* 321 U. S. 565, 570 (1944). Consequently in the *Reed* and *Jackson* cases, this Court was only keeping longshoremen employees of shipowners abreast with Jones Act seamen employees, whereas under the Puerto Rican Act, as construed by petitioner, local longshoremen would have rights superior to those of local seamen,* as was indeed demonstrated prior to the decision below.

Further, with the local seaman employee in Puerto Rico, not having any "traditional" seamen's rights by reason of the exclusiveness of the compensation act, the longshoreman employee is not really being deprived of anything when he is hired directly by the shipowner as the seaman is.

(3) Employee longshoremen vis a vis non-employee longshoremen.

Avoiding any comparison between local seamen and local longshoremen in Puerto Rico, petitioner chooses instead to compare longshoremen employed by shipowners as

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*Compare *Santiago* v. *Hermanos,* 255 F. Supp. 932 (Dist. Ct. P. R.—1966—longshoreman) with *Arroyo* v. *m/v Island Queen II,* 259 F. Supp. 15 (Dist. Ct. P. R.—1966—seaman).

against longshoremen employed by independent stevedores, with the latter having a third-party action, as well as a remedy in compensation. All petitioner has done, however, is point to an ever narrowing exception to the exclusiveness of remedy provision of the Puerto Rican Act. While the longshoreman who is suing a party other than his direct employer has an additional remedy, there is now authority construing the Puerto Rican Act, *Musick* v. *Puerto Rico Telephone Company*, 357 F. 2d 603 (1st Cir. 1966) whereby third-party actions are more circumscribed by the expanded definition of who is employer (or per contra restricted definition of third-party) than in the Longshoremen and Harbor Worker's Compensation Act. It follows that except in maritime employment, there may not be any third-party liability in Puerto Rico to anyone other than strangers to the employment relationship.

There is nothing novel* about such a construction for as *Larson* points out in his *Workmen's Compensation Law*, Volume 2, Section 72.31, p. 175, forty-one states have "statutory-employer" or "contractor-under" statutes insulating the general or principal contractor from third-party suits when the work done by the sub-contractor "is part of the business, trade or occupation of the principal contractor".

Given the foregoing and the *Musick* case, there is no reason why the shipowner in Puerto Rico should not in the future fit the broadened definition of "employer" of longshoremen, immediately employed by others, or why the shipowner is any less an employer of the stevedore's longshoremen than was the Telephone Company of Musick. Indeed, the whole history of this Court's decisions not only minimizes the intervening direct employment by a stevedoring

*See for example *Evans* v. *Newport News Shipbuilding & Dry Dock Company*, 361 F. 2d 364 (4 Cir. 1966).

contractor, but also emphatically holds the longshoremen to be in the service of the ship and performing the shipowner's work,

> *Seas Shipping Co. Inc.* v. *Sieracki*, 328 U. S. 85, 94-97-(1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 413 (1953); *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423, 426-427 (1959); *Reed* v. *s/s Yaka*, 373 U. S. 410, 414-415 (1963).

While there are no present decisions in Puerto Rico it might be said that a longshoreman or other harbor worker, employed by an independent contractor, now stands alone, the sole type of employee within the industrial scheme entitled to sue his "employer" in the expanded sense. If *Musick* be logically followed, however, he should not occupy this role for long and all employees in Puerto Rico would then be in the same position of being able to sue as third-parties only those who are strangers to the employment relationship. All will be dealt with even-handedly, all would be entitled only to their compensation remedies against their employer—as broadly defined.

While petitioner prefers to identify himself with mainland longshoremen, it would seem more fitting that he be asked why he should be entitled to more than all sugar workers and factory employees in Puerto Rico, all railroad employees in Puerto Rico, and all local Jones Act seamen employees in Puerto Rico?

(4) What petitioner advocates would, under the unique provisions of the Puerto Rican Act, permit him to keep not only his compensation but also damages in his third-party suit.

Unlike his counterpart in the states, the Puerto Rican longshoreman, once ninety days elapses after the final decision of the manager of the State Insurance Fund, has

no obligation to reimburse the Fund out of any action thereafter brought by him, 11 L. P. R. § 32, *Waterman Steamship Corp.* v. *Rodriquez*, 290 F 2d 175, 178 (1 Cir 1961), and correspondingly the State Fund has no obligation to credit or reimburse the employer out of the proceeds of any third-party recovery. Petitioner does not dispute this proposition*.

Under the Longshoremen's Act, however, it has been held that the employer and by subrogation of its carrier, has a lien on the proceeds of any damage action recovery; *The Etna*, 138 F. 2d 37, 41 (3 Cir. 1943); *Fontana* v. *Grace Line*, 205 F. 2d 151 (2 Cir. 1953), affirming 106 F. Supp. 461 (1952); *Grace Line Inc.* v. *Kanton*, 366 F. 2d 510, 511 (9 Cir. 1966).

Such a result would undermine the very *quid pro quo rationale* supporting the constitutionality of compensation acts. See *New York Central* v. *White*, 243 U. S. 188, 201-202 (1917); *Mountain Timber Company* v. *Washington*, 243 U. S. 219, 234, 236 (1917) and both opinions in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U. S. 124, 129, 140 (1956).

Larson, in his work on *Workmen's Compensation Law*, says (Volume 2, p. 166, § 71.20):

> "It is equally elementary that the claimant should not be allowed to keep the entire amount both of his compensation award and of his common-law damage recovery."

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*Petitioners brief below (p. 21):

"Whereas the injured longshoreman in the States may have to reimburse the insurance carrier for any payments received out of an award or settlement, the longshoreman in Puerto Rico need reimburse his employer's carrier (the State Insurance Fund), only if the Fund elects to join in the suit."

Assuming this Court believes itself free to construe the Puerto Rican Act, respondent submits that it must then ask itself whether, in light of the foregoing (1-4), it can repeat in Puerto Rico the language of *Jackson* v. *Lykes Brothers,* 386 U. S. 731, 735 (1967):

> "We cannot hold that Congress (the Puerto Rican Legislature) intended any such incongruous, absurd and unjust result in passing this Act." (parenthetical reference supplied)

IV. WHERE THERE IS NO IN PERSONAM LIABILITY ON THE PART OF RESPONDENT BY REASON OF A STATUTORY IMMUNITY OR BAR, THERE CAN BE NO IN REM LIABILITY OF RESPONDENT'S VESSEL.

Whatever other distinctions may exist between in personam and in rem liability, it would be meaningless to afford an employer in personam insulation under an exclusiveness of remedy provision and at the same time expose his property to seizure to satisfy an in rem liability.

A literal reading of the statute itself (11 L. P. R. A., § 21) that compensation "shall be the only remedy against the employer; * * *", any meaningful construction of this language, and finally the decisions of this Court militate against the existence of any dichotomy of liability as urged by petitioner.

This Court has long held that where an in personam immunity or bar exists, there can be no in rem liability. While petitioner brushes off the limitation of liability decisions, *The City of Norwich,* 118 U. S. 468 (1886), *Consumers Imp. Co.* v. *Kabushiki K. K. Zosenjo,* 320 U. S. 249 (1943), they comprise the very class of cases, as the within litigation, which have to do with the statutory shielding of the shipowner from in personam liability, and the effect thereof on in rem liability of the shipowner's vessels.

In *The City of Norwich* this Court stated (p. 503):

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, * * *"
>
> " * * * but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his property."

In 1901, in *The Queen of the Pacific,* 180 U. S. 49, this Court held that a stipulation in a bill of lading requiring that all claims against the shipowner be brought within a certain time, was also a bar against an action in rem against the vessel after said time had expired.

In the *Consumers Import Co.* case, supra, this Court granted certiorari expressly limited to the question (p. 251) "Does the Fire Statute extinguish maritime liens for cargo damage, or is its operation confined to in personam liability only?" in order to resolve a conflict between Circuits. Following the language in *The City of Norwich,* this Court referred again to the riddle of exonerating the shipowner while holding his property liable, saying (p. 253):

> "The riddle after more than half a century repeated to us in different contexts does not appear to us to have improved with age."

* * *

(pp. 253-254)

> "Congress has said that the owner shall not 'answer for' this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them."

The above language from the *City of Norwich* and *Consumers* cases was quoted in *Continental Grain Co.* v. *Barge, FBL-585,* 364 U. S. 19, 24 (1960) wherein this Court subscribed (p. 24) to "the common-sense approach" of these decisions, thus maintaining a consistent line of authority during a period of 74 years.

If Title 11 L. P. R. A., § 21, insulates the employer from in personam liability, to have any "common-sense" meaning, it must do so as well for in rem liability. As the above decisions of this Court demonstrate, the employer's in personam protection will be illusory if he can at the same time be deprived of his property.

CONCLUSION

FOR THE FOREGOING REASONS IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT BE DENIED.

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